No. 82-1281

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,

Appellants,

v.

COMMONWEALTH OF PENNSYVLANIA,
DEPARTMENT OF TRANSPORTATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. If a state statute generally extends the benefits of the withdrawal of bids in the event of arithmetical error to all contractors bidding on public construction work, and excludes from those benefits only bidders on highway construction work, is this exclusionary classification so arbitrary or irrational as to violate the Equal Protection Clause of the Fourteenth Amendment?

2. If the general purpose of the withdrawal of bids legislation is clear, and the exclusion of only one classification of persons affected thereby is patently inconsistent with that general purpose and is not in any way explained or justified in the legislation itself or in the legislative history, should a reviewing court hypothesize as to the reason for the inconsistent exclusionary

classification in determining whether that classification is fairly and substantially related to the general legislative purpose?

PARTIES TO THE PROCEEDING BELOW

All of the parties before the Pennsylvania Supreme Court are listed in the caption.

Appellant Shelly & Sands, Inc. has no parent or affiliate companies. All of its subsidiary companies are wholly owned.

Appellant Buckeye Union Insurance Co. is a subsidiary of The Continental Corporation. It has no subsidiary companies. Its affiliates are Boston Old Colony Insurance Co., Fireman's Insurance Co., The Fidelity & Casualty Co., The Glens Fall Insurance Co., National-Ben Franklin Companies, Niagara Fire Insurance Co., Pacific Insurance Co. and Seaboard Fire & Marine Inspection Co.

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OPINION BELOW

The judgment of the Supreme Court of Pennsylvania (App. A, 1a) was entered November 4, 1982, without opinion, and affirmed the Order of the Commonwealth Court of Pennsylvania dated April 15, 1981 (App. B, 2a). That order was followed by the Memorandum Opinion of Judge Robert W. Williams, Jr. (App. C, 3a) which is not reported.

JURISDICTION

This is an appeal from the final judgment of the Pennsylvania Supreme Court. The Pennsylvania Commonwealth Court had, in effect, upheld the validity of a Pennsylvania statute which extended the right of bid withdrawal to bidders on all public construction work, excepting highway work only. The Commonwealth Court rejected

appellants' constitutional argument that they were denied equal protection of the laws by reason of the statute's exclusionary classification. The Commonwealth Court's order was affirmed by judgment of the Pennsylvania Supreme Court dated November 4, 1982 and entered without opinion. Appellants filed a Notice of Appeal to this Court with the Prothonotary of the Pennsylvania Supreme Court on January 26, 1983 (App. D, 10a). Jurisdiction is conferred on this Court by 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part at Section 1:

"No State shall . . . deny

to any person within its jurisdiction the equal protection of the laws."

The Act of January 23, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602, known as the Pennsylvania Public Contracts Act, provides in relevant part:

"A bidder to any construction contract for the construction, reconstruction, demolition, alteration or repair of any public building or other public improvement or for the provision of services to or lease of real or personal property whether by lease or concession from such contracting body, excepting highway work, may withdraw his bid from consideration after the bid opening without forfeiture of the certified check,

bank cashier's check, surety bid bond or other security filed with the bid if the price bid was submitted in good faith, and the bidder submits credible evidence that the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetical error or an unintentional omission of a substantial quantity of work, labor, material or services made directly in the compilation of the bid; provided, (i) notice of a claim of the right to withdraw such bid is made in writing with the contracting body within two business days after the opening of bids; and (ii) the

withdrawal of the bid would not result in the awarding of the contract on another bid of the same bidder, his partner, or to a corporation or business venture owned by or in which he has a substantial interest. . ."

STATEMENT OF THE CASE

This case arises from an Order of the Commonwealth Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, refusing to open a judgment entered by confession against appellants on a bid bond given with a bid submitted to the Pennsylvania Department of Transportation (PennDOT).

Appellant Shelly & Sands, Inc. submitted a good faith bid to PennDOT for the

improvement of a portion of Interstate Route I-70 in southwestern Pennsylvania. The bid was accompanied by a bid bond executed by it, as principal, and by appellant Buckeye Union Insurance Company, as surety, in the amount of $207,679.05.

The bids for this highway construction work were opened on September 18, 1980. The Shelly & Sands low bid, in the amount of $4,153,518.10, was some $800,000 below that of the next low bidder in a range of bids up to approximately $5,900,000.00. Shelly & Sands immediately reviewed its bid and noted that the unit price included for paved shoulders (Item No. 656-0001) was $5.25 per square yard, which is much less than its cost of the materials alone. A review of its calculations disclosed that Shelly & Sands' estimator had

made an arithmetical error in converting to the cost per square yard from the cost per cubic yard.[1] The difference in the bid resulting from this error was a substantial amount, $190,365.00. Later, it was also discovered that Shelly & Sands inadvertently had not included the Pennsylvania sales tax on materials in calculating its bid. The practice in other states is to exempt materials purchased for state highway projects from sales taxes.

Within two (2) business days after the bid opening, Shelly & Sands hand-delivered a letter to PennDOT withdrawing

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1. The other states in which Shelly & Sands performs highway work call for bids for this item to be submitted on a cubic yard rather than on a square yard basis. This was the first bid that Shelly & Sands had ever submitted on a Pennsylvania highway project.

its bid, pointing out the mistakes and explaining how they occurred. Thereafter, a letter was received from PennDOT awarding the contract to Shelly & Sands at bid price and advising that Pennsylvania laws did not permit withdrawal of the bid after opening.

Shelly & Sands refused to undertake the project on which the bid mistake had occurred, and PennDOT caused judgment to be confessed against Shelly & Sands and its surety in the full amount of the bid bond, plus fees, or $228,446.97. Shelly & ands and the surety, Buckeye Union Insurance Company, then filed a Petition for Rule to Show Cause Why Judgment Should Not Be Opened in the Commonwealth Court of Pennsylvania.

Argument was held on the issues raised by the Petition and Answer before

the Honorable Robert W. Williams, Jr., Judge of the Commonwealth Court. The facts were placed before the Court on a formal stipulation of the parties and on the affidavits of their respective officers and administrators. On April 15, 1981, the Commonwealth Court entered an Order (App. B, 2a) denying the Petition to Open Judgment. Upon Shelly & Sands' ensuing appeal, Commonwealth Court Judge Robert W. Williams, Jr. wrote and filed a Memorandum Opinion (App. C, 3a) holding that no factual issue could be found which would justify opening judgment and, further, that the exclusion of highway contractors from the bid withdrawal benefits of the Pennsylvania Public Contracts Act (Act of January 25, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602) did not deprive Shelly & Sands of equal protection of

the laws.

On appeal to the Supreme Court of Pennsylvania, that court entered final judgment (App. A, 1a) dated November 4, 1982 affirming the Commonwealth Court order.

THE QUESTIONS ARE SUBSTANTIAL

Pennsylvania's attempt to secure limited economic benefits to firms bidding on public construction projects raises fundamental questions under the Equal Protection Clause of the Fourteenth Amendment. Generally, the Public Contracts Act simply provides economic relief to firms bidding on public construction projects when it is discovered in a timely fashion that a low bid submitted in good faith is somehow erroneous by reason of clerical mistake and unintentional and substantial arithmetical error. When this occurs, the

bidder may withdraw the bid without forfeiture of its check, bond or other security. The fundamental question arises with the solitary exclusion of firms which bid on highway construction work.

This state legislation deals solely with economic benefits and limitations. The Pennsylvania Public Contracts Act concededly does not create "suspect" classifications such as race or national origin, nor does it impinge on traditionally "fundamental" constitutional rights such as travel or privacy. What the Act does is deny to highway contractors a right of bid withdrawal on public construction work which it creates and extends to other contractors bidding on all other kinds of construction work. Under these circumstances, the constitutional legitimacy of the Act as measured against the proscription of the Equal Protection Clause is not to be determined under the stringent judicial

scrutiny standard utilized in suspect classification and fundamental rights cases. See San Antonio School Board v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288 (1973), Dandridge v. Williams, 397 U.S. 471, S.Ct. 1153 (1970). Instead, the proper standard for review is the "rational basis" test. See Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943 (1979), City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516 (1976).

To state that "rational basis" is the standard for review does not however give precise meaning to that standard. This Court has not been entirely consistent in its evaluation and applications of the "rational basis" test. The Court so noted in U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75, 101 S.Ct. 453, 459 (1980), where it stated: "In Lindsley

v. National Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911), the Court said that 'when the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed.' On the other hand, only nine years later in Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920), the Court said that for a classification to be valid under the Equal Protection Clause it 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation....'"

The Court in Fritz also noted its pronouncement on "rational basis" made earlier in Dandridge v. Williams, 397 U.S.

471, 485, 90 S.Ct. 1153, 1161 (1970) where the Court stated: "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369...."

On the other hand, the Court has also said: "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074,

1080 (1981). Further, it has said that "the classificatory scheme must 'rationally advanc[e] a reasonable and identifiable governmental objective.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 439, 102 S.Ct. 1148, 1160 (1982) (separate opinion of Justice Blackmun) quoting Schweiker v. Wilson, 450 U.S. at 235, 101 S.Ct. at 1083. And it has also held: "The Equal Protection Clause...does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be

treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)." Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-54 (1971).

The Pennsylvania act is generally sweeping in its extension to bidders on any public construction work of the right to withdraw a bid from consideration without forfeiture in the event of clerical mistake and substantial arithmetical error. In the instant case, the appellant-contractor's bid withdrawal was timely and in compliance with all other provisions of the act but one. The bid was for highway construction work which is the sole stated exception to the right of withdrawal. In other words, under this legislation, highway contractors are placed in one classification of bidders and are denied the right to withdraw a

bid without forfeiture. All other contractors are placed in another classification and are accorded the right to withdraw a bid without forfeiture under stated circumstances. The act itself contains no statement of the purpose of the solitary exclusion as to highway construction work. There is nothing apparent from or implicit in the statutory classification scheme which rationally explains the discrimination between bidders similarly circumstanced or which justifies treating bidders on public highway work different from bidders on all other public construction work. Finally, there is nothing reported in the respective Legislative Journals of the Pennsylvania Senate and House of Representatives which affords any clue to a rational purpose behind the highway

construction work exclusion from the otherwise universal right of bid withdrawal under the act.

It is apparent from the face of the statute that the legislative objective is to provide a limited opportunity to escape the disastrous financial consequences of submitting in good faith a substantially lower bid on a public works project due to a clerical mistake. It is not apparent -- nor is it stated directly or otherwise -- how the exclusion of one classification of contractors from this salutary opportunity can further or abet that legislative objective. To the contrary, the exclusion of only one category of contractors without explanation or expressed justification is patently antithetical to the legislative objective. Stated another way, this exclusion rests on no difference which has a fair and

substantial relation to the objective of the legislation. Hence, the legislative classification between highway contractors and all other contractors is utterly arbitrary and invidious even under the relaxed standards of judicial scrutiny applicable to economic interest cases under the Equal Protection Clause.

Because there is no legislative history explaining or justifying the exclusion of highway contractors under the Pennsylvania bid withdrawal legislation, the pronouncements of Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981) are not apposite here. There the Court noted that the burden is on those challenging the legislative judgment to convince the Court that the facts supposedly supporting the classification could not reasonably be conceived to be true by the governmental

decisionmaker. The difference here is that there are no known or apparent facts on which the exclusionary classification as to highway contractors is based, and there was no known evidence before the legislature reasonably supporting the exclusionary classification. The exclusion of highway contractors from the bid withdrawal right is inexplicably but obviously inconsistent with the apparent legislative objective; and it is not possible to conclude that the Pennsylvania legislature could rationally have decided that its discriminatory treatment of highway contractors might enhance the generally ameliorative impact of its enactment.

The total absence of any indication of the legislative purpose behind the exception to the bid withdrawal legislation -- where the general objective of the

statute is clear on its face -- sets this case apart from the other economic interest cases recently before the Court on an equal protection issue. In this connection, the view of Justice Powell, dissenting in Schweiker v. Wilson, 450 U.S. 221, 243-45, 101 S.Ct. 1074, 1087-88, is pertinent. There, it was noted that members of the Court continue to hold differing views on the clarity with which a legislative purpose need be evident; and it was stated:

> ".... When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernable purpose receive the most respectful deference. [citations omitted] Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative

> purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.
>
> "In my view, the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose. See Royster Guano v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561 64 L.Ed. 989 (1920). This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.' Fritz, supra, 101 S.Ct. at 461 (STEVENS, J., concurring)."

This is an instance where a legitimate purpose for the general bid withdrawal right is implicit in the statute even though no supporting legislative history is articulated. At least, this

Court or any court has some assurance that the legislature had indeed made a conscious economic policy choice in generally ameliorating the disasterous impact of inadvertent error in submitting public construction bids. There is no reason at that point not to accord the legislation full deference. But the legislature did not stop with creation of a general right having an implicit identifiable purpose. It also carved out an exclusion to the benefits of its general economic policy. That exclusion on its face is not a temporary measure or one phase of a step-by-step measure. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976). The exclusion of highway contractors is permanently engrafted in the legislation and runs utterly contrary to the implicit

ameliatory economic policy effectuated generally by the statute. There is no evidence that the legislature had a legitimate goal or purpose in establishing the exclusionary classificaton and no evidence that it ever considered competing factors to arrive at a social or economic rationale for doing so. The exclusion engrafted by Pennsylvania in this situation is not only unexplained, it is nonsensical and contradictory in view of the general thrust of the statute.

If, as articulated in Weinberger v. Weisenfeld, 420 U.S. 636, 648, n.16, 95 S.Ct. 1225, 1233, n.6 (1975), this Court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose

could not have been a goal of the legislation....," then surely it need not and ought not to accept hypotheses of counsel as to purpose where a comparison of the unexplained exclusionary scheme with the general provisions of the legislation demonstrates that the single exclusion is antithetical to the implicit goal of the amelioratory legislation.

Here, the general legislative purpose is indeed identified, but that of the exclusionary classification is not. The exclusion of highway contractors fails utterly to further the identified purpose of the statute generally, and is otherwise baldly discriminatory. It should be struck down consistent with the standard enunciated in Schweiker v. Wilson, 450 U.S. 221, 230 101 S.Ct. 1074, 1080 (1981), requiring at minimum level a classification rationally related to the legitimate

statutory objective.

CONCLUSION

For these reasons, the appellants urge that the Court note probable jurisdiction.

Respectfully submitted,

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